8-31-2011

State v. Scraggins Appellant's Brief Dckt. 38212

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NOS. 38212 & 38213
	)	
v.	)	
	)	
ABRAHAM SCRAGGINS, JR.,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

This is a consolidated appeal of the district court's orders revoking probation in two separate (but related) criminal cases. On appeal, Abraham Scraggins contends that the district court violated his Fourteenth Amendment right to due process by revoking his probation based on the very same violations for which he had already been punished through the imposition of an intermediate sanction, *i.e.*, ten days of discretionary jail time. He requests that the district court's orders be vacated, and that his case be remanded to the district court with an instruction that he be returned to probation.

Statement of the Facts and Course of Proceedings

In 1993, Abraham Scraggins was convicted of a single count of sexual battery of a minor. (*See* 1993 PSI, p.5.)[1] Because of that conviction, Mr. Scraggins now has ongoing sex offender registration obligation. *See* I.C. § 18-8304.

On April 24, 2009, Mr. Scraggins was charged, in Ada County Case No. CR-FE-2009-7354 (*hereinafter*, First Case), with a violation of the sex offender registration statute for failing to register with the Ada County Sheriff within two days of coming into Ada County. (R., pp.10-11.)

On or about June 25, 2009, Mr. Scraggins entered into a plea agreement with the State in the First Case. Under the terms of that agreement, Mr. Scraggins pled guilty to

[1] There are a plethora of materials that appear as exhibits to the Clerk's Record in this consolidated appeal. These include pre-sentence investigation reports (PSIs) from 1986, 1988, 1990, 1993, and 2009; the 2010 addendum to the 2009 PSI (APSI); the September 14, 2009 and July 21, 2010 reports of probation violations; and copious attachments to all of the foregoing.

the charged offense of failure to register and, in exchange, the State agreed to recommend probation, with an underlying suspended sentence of no more than ten years, with two years fixed, and it agreed not to pursue a persistent violator enhancement. (6/25/09 Tr., p.1, L.10 – p.3, L.12.) On August 20, 2009, the district court imposed a unified sentence of ten years, with five years fixed, but it suspended that sentence and placed Mr. Scraggins on probation under certain specified conditions, one of which was that Mr. Scraggins continue to meet his registration requirements. (R., pp.32-37; 8/20/09 Tr., p.25, L.10 – p.32, L.13.)

Shortly after having been placed on probation in the First Case, Mr. Scraggins was accused of having moved out of his home without providing written notice to the Ada County Sheriff and then submitting false information to the Sheriff indicating that he was still residing at his old address.[2] (*See* R., pp.46, 102.) Based on these allegations, on September 25, 2009, the State moved to revoke Mr. Scraggins' probation in the First Case. (R., pp.45-46.) In addition, on October 26, 2009, in a separate case, Ada County Case No. CR-FE-0920101 (*hereinafter*, Second Case), the State charged Mr. Scraggins with two new counts of failure to register. (R., pp.101-02.)

On or about November 25, 2009, Mr. Scraggins entered into another plea agreement with the State. Under the terms of this agreement, Mr. Scraggins pled guilty to one of the two counts of failure to register in the Second Case, and admitted to a probation violation in the First Case; in exchange, the State dismissed the other count of failure to register in the Second Case and agreed to limit its sentencing

[2] It appears that Mr. Scraggins became homeless (because his roommate, who was also on felony probation, did not want to jeopardize his own probation by having Mr. Scraggins living in his home and, thus, asked Mr. Scraggins to leave) and failed to understand how to comply with the sex offender registration statute in that situation. (*See* 12/17/09 Tr., p.9, L.1 – p.11, L.3.)

recommendation in the Second Case to ten years, with two years fixed; in both cases, the State agreed to recommend retained jurisdiction. (11/25/09 Tr., p.35, L.10 – p.39, L.25.)

A joint sentencing (Second Case) / disposition (First Case) hearing was held on December 17, 2009. (*See generally* R., pp.57-58, 117-18; 12/17/10 Tr.) At that hearing, the district court revoked Mr. Scraggin's probation and ordered his original sentence into execution in the First Case; it imposed a concurrent unified sentence of ten years, with five and one-half years fixed, in the Second Case; and it retained jurisdiction in both cases. (R., pp.59-60, 119-22; 12/17/10 Tr., p.12, Ls.5-23.)

On June 10, 2010, following Mr. Scraggin's period of retained jurisdiction ("rider"), the district court held a review hearing. (*See generally* R., pp.62-63, 123-24; 6/10/10 Tr.) At the conclusion of that hearing, the district court suspended both of Mr. Scraggins' sentences and reinstated him on probation. (R., pp.65-71, 126-32; 6/10/10 Tr., p.10, L.20 – p.11, L.13.) Again, the district court specified a number of conditions of probation, including the requirements that he: obey "the rules of probation as prescribed by the Board of Correction"; not purchase, consume or possess any alcoholic beverages; and that he not have any contact with Dawn Hawkins, the victim of his 1993 sex offense. (R., pp.65-71, 126-32; 6/10/10 Tr., p.11, L.16 - p.19, L.12.) In addition, the district court granted Mr. Scraggins' probation officer authority to impose up to 180 days of jail time without pre-approval from the district court:

> 7. Defendant shall serve an additional one hundred eighty (180) days in the Ada County Jail at the discretion of the probation officer, without prior approval of the Court. The probation officer has the discretion and authority to immediately deliver Defendant to the Sheriff for incarceration in the county jail for the purpose of having Defendant serve this discretionary time and the Sheriff shall commit the Defendant to serve

> this time on request of the probation officer without further order from the Court. The probation officer shall immediately file with the Court a written statement of the reasons Defendant has been placed in custody, for review by the Court. The probation officer shall have all options available including work release and S.L.D., subject to eligibility determined by the Sheriff.

(R., pp.67, 128; 6/10/10 Tr., p.13, L.11 – p.14, L.4.)

On July 7, 2010, Mr. Scraggins was observed by probation officers returning to his residence past his curfew. (Report of Probation Violation, p.1 (Jul. 21, 2010).)[3] He was immediately arrested. (Report of Probation Violation, p.1 (Jul. 21, 2010).) Thereafter, upon being questioned by the officers, he admitted to having consumed alcohol and had contact with Dawn Hawkins. (Report of Probation Violation, pp.1-2 (Jul. 21, 2010); *see also* Statement of Abraham Scraggins Jr., p.1 (Jul. 19, 2010).[4]) Based on these violations of the conditions of his probation, Mr. Scraggins was immediately jailed and, ultimately, served 10 of the 180 days of discretionary jail time that had been authorized by the district court. (10/14/10 Tr., p.66, Ls.9-17, p.68, Ls.2-10, p.69, L.15 – p.70, L.5; Letter from Lori Pino to Judge Wetherell (Jul. 19, 2010).)[5] According to Mr. Scraggins' probation officer, this discretionary jail time was imposed "[i]n lieu of filing a report of violation . . . ." (Letter from Lori Pino to Judge Wetherell (Jul. 19, 2010).)

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[3] As noted above (*see* note 1, *supra*), the July 21, 2010 Report of Probation Violation is included as an exhibit to the Clerk's Record.

[4] The July 19, 2010 Statement of Abraham Scraggins Jr. is attached to the July 21, 2010 Report of Probation Violation.

[5] Ms. Pino's letter, which is attached to the July 21, 2010 Report of Probation Violation, indicates that seven days of discretionary jail time were imposed (Letter from Lori Pino to Judge Wetherell (Jul 19, 2010)); however, the parties later stipulated that this number appearing in Ms. Pino's letter was a typographical error, as ten days of discretionary jail time were imposed (*see* 10/14/10 Tr., p.68, Ls.2-10, p.69, L.15 – p.70, L.5).

Interestingly, Mr. Scraggins' probation officer did not "immediately file with the Court a written statement of the reasons Defendant has been placed in custody, for review by the Court," as was required by the district court's probation orders (R., pp.67, 128; 6/10/10 Tr., p.13, L.11 – p.14, L.4); she first notified the district court of her use of discretionary jail time twelve days after Mr. Scraggins was incarcerated (and two days after he was released)—on July 19, 2010. (*See* Letter from Lori Pino to Judge Wetherell (Jul. 19, 2010).) That same day, she re-arrested him, this time on an agent's warrant alleging the very same probation violations for which Mr. Scraggins had just served ten days of discretionary jail time. (*See* Agent's Warrant of Arrest (Jul. 19, 2010); Affidavit (Jul. 19, 2010).)[6]

On July 21, 2010, Mr. Scraggins' probation officer filed a Report of Probation Violation alleging, *inter alia*, two of the three violations for which Mr. Scraggins had served his discretionary jail time. (*See generally* Report of Probation Violation (Jul. 21, 2010).) Notably, that report incorrectly asserted that no intermediate sanctions had been imposed upon Mr. Scraggins, explaining that "[t]he defendant was not on supervision long enough to introduce any sanctions." (Report of Probation Violation, p.2 (Jul. 21, 2010).)

On July 27, 2010, the State filed motions in both of Mr. Scraggins' cases seeking revocation of his probation. (R., pp.78-80, 139-41.) Those motions alleged six different probation violations, including the three for which Mr. Scraggins had suffered the intermediate sanction of ten days of discretionary jail time. (*See* R., pp.79, 140.)

[6] Both the warrant itself, and Ms. Pino's supporting affidavit, are attached to the July 21, 2010 Report of Probation Violation.

On or about September 16, 2010, Mr. Scraggins entered into an agreement with the State concerning his alleged probation violations. Under the terms of that agreement, Mr. Scraggins admitted to three of the alleged probation violations (failing, on July 7, 2010, to abide by the curfew set by his probation officer; consuming or possessing alcohol on July 7, 2010; and having contact with Ms. Hawkins on July 7, 2010) and agreed to participate in any ordered evaluations. (*See* 9/16/10 Tr., p.5, Ls.12-21, p.6, Ls.18-23.) In exchange, the State agreed to dismiss the other three alleged violations. (9/16/10 Tr., p.5, Ls.14-21.)

A disposition hearing was held on October 14, 2010. (*See generally* 10/14/10 Tr.) At that hearing, the State recommended that the district court revoke probation and order Mr. Scraggins' sentence into execution. (10/14/10 Tr., p.60, L.18 – p.65, L.9.) In response, Mr. Scraggins, through counsel, argued that the district court could not, consistent with the due process guarantee of the Fourteenth Amendment, revoke his probation because no *new* probation violation(s) had been found. (10/14/10 Tr., p.66, L.2 – p.68, L.21, p.71, Ls.9-17, p.72, L.2 – p.73, L.2.) In making this argument, Mr. Scraggins relied on the fact that the three probation violations that he had recently admitted in open court (and pursuant to his agreement with the State) were the same three violations for which he had already been punished with ten days of discretionary jail time. (10/14/10 Tr., p.66, L.2 – p.68, L.21, p.71, Ls.9-17, p.72, L.2 – p.73, L.2.) Ultimately, however, the district court rejected Mr. Scraggins' argument, revoked probation in both cases, and ordered Mr. Scraggins' sentences into execution. (10/14/10 Tr., p.73, L.3 – p.75, L.1, p.76, L.7 – p.77, L.9.) The district court then entered written probation revocation orders on October 18, 2010. (R., pp.89-90, 150-51.)

On October 27, 2010, Mr. Scraggins filed notices of appeal which were timely from the district court's orders revoking probation. (R., pp.92-94, 153-55.) Thereafter, the Idaho Supreme Court consolidated the two appeals. (R., pp.3-4.) In this consolidated appeal, Mr. Scraggins contends that it was impermissible, under the due process clause of the Fourteenth Amendment, for the district court to have revoked probation for violations that had already been punished through the intermediate sanction of ten days of discretionary jail time.

ISSUE

Does the due process clause of the Fourteenth Amendment permit a district court to revoke probation for past violations which were previously punished through the intermediate sanction of discretionary jail time?

ARGUMENT

The Due Process Clause Of The Fourteenth Amendment Does Not Permit A District Court To Revoke Probation For Past Violations Which Were Previously Punished Through The Intermediate Sanction Of Discretionary Jail Time

A. Introduction

The United States Supreme Court has made it clear that when a person's liberty is put in jeopardy through governmental action, that person is entitled to due process under the Fourteenth Amendment. Thus, it has held that probationers are entitled to due process when the conditional liberty they enjoy while on probation is taken away through the revocation of probation.

In this case, Mr. Scraggins contends that his right to due process was violated when his probation was revoked based on three probation violations that had already been punished through the intermediate sanction of ten days of discretionary jail time.

B. Standard Of Review

Because Mr. Scraggins is asserting a deprivation of his Fourteenth Amendment right to due process, he raises a Constitutional issue. The resolution of Constitutional issues requires resolution of questions of law, over which Idaho's appellate courts exercise free review. *City of Boise v. Frazier*, 143 Idaho 1, 2 (2006).

C. The Due Process Clause Of The Fourteenth Amendment Does Not Permit A District Court To Revoke Probation For Past Violations Which Were Previously Punished Through The Intermediate Sanction Of Discretionary Jail Time

In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the United States Supreme Court was called upon to decide whether parolees are entitled to due process of law when a state seeks to revoke their parole and, if so, what process they are due. In beginning to answer the first of these two questions, the Court observed that the applicability of

constitutional rights does not turn on whether the government benefit is considered a right or a privilege, but whether the person has a liberty or property interest in that benefit such that if that benefit is lost, the person would suffer a grievous loss. *Id.* at 481. It then observed that although a parolee is subject to many restrictions, he still enjoys "the core values of unqualified liberty," and the loss of such constitutes a "grievous loss." *Id.* at 482. Accordingly, it held that parolees have a right to due process in parole revocation proceedings. *Id.*

Because it concluded that parolees are entitled to due process in parole revocation proceedings, the *Morrissey* Court then had to address the next logical question, *i.e.*, to what process is a parolee due? The Court observed that whatever process is due must be calculated to answer two questions; the threshold question is whether the parolee has violated the conditions of his parole, and the subsequent question is whether such a violation, if found, would warrant revocation of parole. *Id.* at 483. Ultimately, the Supreme Court went on to identify the minimum requirements of due process where a state seeks to revoke parole. *See id.* at 486-89.

Explicit in *Morrissey* is the requirement that there be no parole revocation (and, thus, loss of liberty) without, first, a finding that the defendant violated one or more of the conditions of his parole. The Court explained as follows:

> Implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole. The first step in a revocation decision thus involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parole be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation?

Id. at 479-80; *see also id.* at 482 ("The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions."), 483 ("The discretionary aspect of the revocation decision need not be reached unless there is first an appropriate determination that the individual has in fact breached the conditions of parole.").

One year after deciding *Morrissey*, the Supreme Court extended that case's holdings to the probation revocation arena. In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the Court held that because a probation revocation, like a parole revocation results in a loss of liberty, a probationer, like a parolee, is entitled to due process of law in the revocation process. *See id.* at 782. Accordingly, it is self-evident that probation, like parole, may not be revoked in the absence of a violation of the terms and conditions of the individual's conditional liberty.

One question that neither *Morrissey* nor *Gagnon* explicitly answered, however, is whether there may be a revocation where, although there have clearly been violations of the conditions of probation, the violations occurred in the past and were previously punished through the use of intermediate sanctions, such as discretionary jail time. That, of course, is the question before the Court in this case.

Although *Morrissey* and *Gagnon* did not explicitly address the issue before the Court in this case, Mr. Scraggins submits that the principles announced in those cases demand a conclusion that probation cannot, consistent with the due process guarantee of the Fourteenth Amendment, be revoked based solely on past violations that were previously punished through imposition of discretionary jail time. "[F]undamental fairness" is "the touchstone of due process," as guaranteed by the Fourteenth Amendment, *Gagnon*, 411 U.S. at 790, and it is fundamentally unfair to punish a

probationer for certain probation violations through the imposition of discretionary jail time (for which he receives no credit against his underlying sentence[7]) then, after he has completed that discretionary jail time, punish him a second time by revoking his probation and sending him to the penitentiary to serve more time in incarceration for the very same probation violations.

Furthermore, although *Morrissey* discussed of one of the government's implied promises in granting parole—the promise not to revoke parole except upon the failure of the parolee to "live up to the parole conditions," *Morrissey*, 408 U.S. at 482—it seems obvious that there is at least one other promise that is implied when an individual is placed on probation or parole—the promise that the government will punish a violation either through intermediate sanctions *or* revocation, but not both.[8] *See id.* at 478-79 (suggesting that significant violations may be punished through revocation but, typically, relatively minor violations will be dealt with through other means). Indeed, without such a promise, the probationer would have minimal incentive to accept the intermediate sanction and continue on probation; in many cases, the probationer would be wise to simply withdraw from probation and begin serving his sentence. *See State v. McCool*, 139 Idaho 804, 807 (2004) (treating probation as a voluntary choice by the defendant).

Although there do not appear to be many published opinions dealing with situations such as the one that is present in this case, other courts have provided some persuasive guidance. For example, in *Byrd v. Caswell*, 34 P.3d 647 (Okla. Ct. Crim.

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[7] *See State v. Dana*, 137 Idaho 6, 8-9 (2002).

[8] In this case, the State's promise was more than implied; it appears to have been expressly made. As noted, Mr. Scraggins' probation officer's letter to the district court indicated that the intermediate sanction of discretionary jail time was being imposed "[i]n lieu of filing a report of violation" for the violations at issue. (Letter from Lori Pino to Judge Wetherell (Jul 19, 2010).)

App. 2001), the Oklahoma Court of Criminal Appeals held that the government could not file an application to revoke probation, fail to hold a timely hearing on that application, dismiss that application, and then re-file the application based on the same alleged violations; it held that, in order to re-file an application for probation revocation, the government has to allege new violations.[9] *Id.* at 649-50.

Likewise, the Texas courts have also limited the government's ability to revoke probation based on past violations. In *Rogers v. State*, 640 S.W.2d 248 (Tex. Ct. Crim. App. 1982), the Texas Court of Criminal Appeals noted in *dicta* that where the trial court found a probation violation and continued the defendant on probation, it could not, consistent with due process, revoke the defendant's probation three months later without first finding a new probation violation.[10] *See id.* at 251. At the same time that it voiced this *dictum* in *Rogers*, the Court of Criminal Appeals held in a separate case, *Wright v. State*, 640 S.W.2d 265 (1982), that due process demands that "[w]hen a probationer is returned to probation [following a probation violation] . . . probation may not be revoked without any determination of a new violation." *Wright*, 640 S.W.2d at 270; *accord State v. Rains*, 678 S.W.2d 308, 309-10 (Tex. Ct. App. 1984) (citing *Rogers* and finding a due process violation where the defendant's probation was revoked for the

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[9] Although *Byrd* was decided based on an Oklahoma statute providing that the state has twenty days from the defendant's arraignment in which to justify its application to revoke probation, *see Byrd*, 34 P.3d at 648-49, the dissent in that case made it clear that the statute at issue was passed by the Oklahoma Legislature in an effort to provide probationers with due process, as had been required by *Morrissey* and *Gagnon*. *See id.* at 650-51 (Lumpkin, J., dissenting).

[10] Although the *Rogers* Court initially couched its due process discussion as a holding, *see Rogers*, 640 S.W.2d at 251, upon rehearing (twice), it made it clear that, although it continued to adhere to the due process analysis, the due process issue had not been preserved and, thus, the error was waived, *see id.* at 263-64.

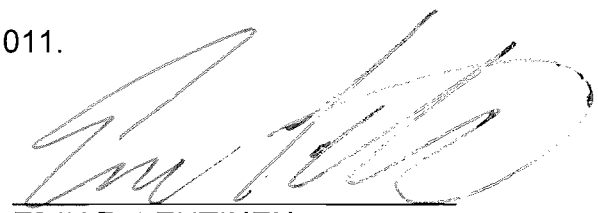
same violations that had previously been found and had been the basis for reinstating probation with certain modifications).[11]

Based on these authorities, especially *Morrissey* and *Gagnon*, Mr. Scraggins submits that the revocation of his probation, based solely on violations that had already been punished through ten days of discretionary jail time, violated his right to due process, as guaranteed by the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, Mr. Scraggins respectfully requests that this Court vacate the district court's October 18, 2010 orders revoking his probation, and that it remand his case with an instruction that he be returned to probation.

DATED this 31st day of August, 2011.



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[11] Mr. Scraggins acknowledges that, more recently, in *Applin v. State*, 341 S.W.2d 528 (Tex. Ct. App. 2011), the Texas Court of Appeals found no constitutional violation where the defendant's probation was revoked based on the same probation violations for which she had previously been sanctioned with jail time. *Id.* at 532-34. That case, however, is not applicable here because the defendant's constitutional challenge in that case was couched in terms of a double jeopardy violation, not a due process violation. *See id.* at 532, 540. Although it cannot be certain how the Texas Court of Appeals would have ruled in *Applin* had the defendant/appellant made the correct argument, one thing that is certain is that the dissenting judge on the three-judge panel would have reached the due process issue even though it was not even raised, and she easily would have found the existence of a blatant due process violation. *See id.* at 536-40 (Dauphinot, J., dissenting).

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 31st day of August, 2011, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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MICHAEL E WETHERELL
DISTRICT COURT JUDGE
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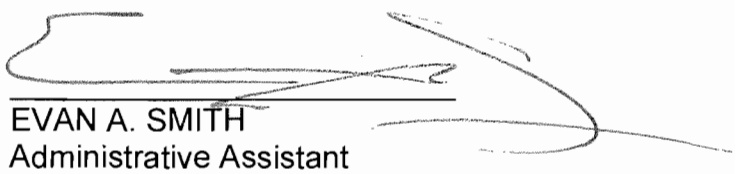

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